

*Amendment and Response to 3/21/2006 Office Action
U.S. App. Ser. No. 10/750,3447
Attorney Docket: 057200/0121189*

REMARKS

Claims 2, 3, 5, 6, 8-11, and 13-20 are pending in the application. In the Office Action mailed March 21, 2006, claims 2, 3, 5, 6, 8-11, and 13-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Pat. No. 4,880,417 (Yabrov et al) in view of U.S. Pat. No. 5,665,081 (Grosse).

I. Summary of Applicant-Initiated Examiner Interview

An Examiner Interview was held on May 10, 2006. The Applicant greatly appreciates the courtesy extended to the Applicant's attorney by the Examiner during the Interview. During the Interview, the combination of the Yabrov and Grosse references, the failure of the references of record to disclose the Applicant's "midline ridge" element, the status of the indication of allowable subject matter in the February 24, 2005 Office Action, and the Applicant's proposed claim amendments were discussed.

With respect to the Grosse reference, the Applicant presented the Applicant's position that the Grosse reference, used by the Examiner to provide an equivalent to the "additional pad" of the Applicant, does not in fact disclose the raised structure (dam) provided by the additional pad of the Applicant because the dam of Grosse is not liquid-absorbent, but rather is only capable of absorbing odors. In contrast, in order to obtain the benefits of the Applicant's invention, the raised structure/additional pad must be liquid-absorbent, as the Applicant's invention is directed entirely to absorbing liquid exudates, not odors. The combination of Grosse with Yabrov would therefore not give the invention of the Applicant. The Examiner indicated that this argument would require further consideration.

With respect to the propriety of the combination of the Grosse reference with the Yabrov reference, the Applicant presented the Applicant's position that the combination of Yabrov with Grosse was improper because there was no motivation to combine the references. As presented in the Office Action, the references were combined "for the benefits that Grosse discloses"; however, as discussed previously, the benefits that Grosse discloses (absorbing odors) are not the benefits provided by the Applicant's invention (absorbing liquid exudates) and vice-versa. The Applicant also presented that the semi-rigid or rigid structure of Yabrov, when combined with

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the dam of Grosse, would not be the equivalent of the Applicant's invention because the semi-rigid or rigid structure of Yabrov would cause the wearer discomfort when attached to the dam of Grosse and then inserted between the buttocks of the user. The Examiner indicated that these arguments would require further consideration.

With respect to the Applicant's "midline ridge" element, as called out in claims 3 and 15 and their respective dependent claims, the Applicant presented to the Examiner that the element was not shown in the cited references or any other art of record. The Examiner indicated agreement that the references of record do not show the Applicant's "midline ridge" element.

With respect to the indication of allowable subject matter in the February 24, 2005 Office Action, the Applicant requested clarification because the Applicant believed that the amendment made December 27, 2005 placed the claims in condition for allowance by adopting the Examiner's suggestions as laid out in the indication. The Examiner stated that, in addition to withdrawing the indication of allowability because claim 2 as amended by the May 24, 2005 response was broader than the indicated allowable subject matter, as was stated in the August 25, 2005 Office Action, she had also reconsidered the Yabrov and Grosse references and that the indication of allowable subject matter was therefore also withdrawn due to that reconsideration. The Examiner acknowledged that this reason was not presented in the August 25, 2005 Office Action.

With respect to the proposed claim amendments, specifically the addition of a limitation to clarify that the additional pad of the Applicant is liquid-absorbent and/or to call out that the article of the Applicant is of non-rigid construction, the Applicant presented arguments as to why each limitation would distinguish the claims over the combination of Yabrov with Grosse and the other art of record. The Examiner indicated that the proposed amendments and related arguments would require further consideration.

II. Request for Withdrawal of the Finality of the Office Action and Entry of Amendments

The Applicant respectfully requests that the finality of the Office Action of March 21, 2006 be withdrawn and that the amendments presented herein be entered.

In the Office Action mailed February 24, 2005, the Examiner provided an indication of "Allowable Subject Matter" that stated that claims 2, 3, 5, 6, 8, and 9 were objected to as being

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dependent upon a rejected base claim but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. In the August 25, 2005 Office Action, the indication of allowable subject matter for claim 2 and its dependent claims was withdrawn, for the specific reason that the "*amendment to claim 2 is broader in scope than the original claim. Specifically, the claim does not require a narrower front region and wider back region and pear-shaped article.*"

In the response filed December 27, 2005, the Applicant amended the claims to adopt the Examiner's suggestions in the two preceding Office Actions and put the application in condition for allowance by calling out that *the article has a wide first end adapted for covering at least part of the buttocks region and a narrow second end and an additional absorbent pad of medium thickness*. The Applicant did not submit substantial arguments regarding this amendment because the Applicant was directly adopting the Examiner's suggestions. The amendment was entered but, in the March 21, 2006 Office Action, the claims were again rejected over the combination of Yabrov and Grosse and the rejection was made Final.

The Applicant discussed the status of the indication of allowable subject matter with the Examiner during the May 10, 2006 Interview, at which time the Examiner acknowledged that she had reconsidered the Yabrov and Grosse references and that the indication of allowable subject matter was *also* withdrawn due to that reconsideration, *although the Applicant was not notified of that reason*. Because of this, in the response submitted on December 27, 2005, the Applicant did not have a full and fair opportunity to respond to all of the Examiner's reasons for rejection, because the Applicant had not been made aware of all of those reasons. The Applicant therefore submitted an amendment that, while overcoming all of the rejections then of record, did not result in allowance of the application.

The Applicant now presents amendments and arguments that the Applicant believes will overcome all of the rejections, including the Examiner's reconsideration of the Yabrov and Grosse references, and that will result in allowance of the application. In view of the fact that the Applicant could not have presented these amendments earlier due to not having been made aware that they were necessary, the Applicant respectfully requests that the amendments be entered under 37 CFR 1.116(b)(3) and that the finality of the March 21, 2006 Office Action be withdrawn.

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III. Request for Indication of Acceptance of Previously-submitted New Drawing

In the response filed December 25, 2005, the Applicant submitted a new drawing, labeled Fig. 9. The Examiner has kindly indicated by telephone that she has accepted the new drawing, but the Applicant respectfully requests that this acceptance be placed into the written record so that no question may be raised later regarding whether the drawing presented new matter or was ever accepted.

IV. Rejections under 35 U.S.C. 103(a)

Claims 2, 3, 5, 6, 8-11, and 13-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Yabrov in view of U.S. Pat. No. 5,665,081 (Grosse). The Applicant respectfully traverses the Examiner's rejection. The Applicant's invention is not obvious over Yabrov in combination with Grosse or any other art of record, because (1) combination of Yabrov with Grosse would not operate to provide the invention of the Applicant, (2) combination of Yabrov with Grosse would change the principle of operation of Grosse, (3) there was no suggestion or motivation in Yabrov, Grosse, in any other reference, or in the knowledge generally available to one of ordinary skill in the art of the Applicant's invention to combine Yabrov with Grosse to obtain the benefits of the Applicant's invention, (4) there was no reasonable expectation of success from the combination of Yabrov with Grosse, and (5) the problems with the prior art in the Applicant's field of endeavor were well known and long-felt but, despite the existence of the Yabrov and Grosse teachings, the art tried and failed to solve the problems.

The Applicant's invention is not obvious over Yabrov in combination with Grosse or any other art of record, because combination of Yabrov with Grosse would not operate to provide the invention of the Applicant. As discussed in the Interview, the Grosse reference, used by the Examiner to provide an equivalent to the "additional pad" of the Applicant, does not in fact disclose the raised structure (dam) provided by the additional pad of the Applicant because the dam of Grosse is not liquid-absorbent, but rather is only capable of absorbing odors. In contrast, in order to obtain the benefits of the Applicant's invention, the raised structure/additional pad of

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the Applicant is liquid-absorbent, as the Applicant's invention is directed to absorbing liquid exudates, not odors.

It is clear that the dam of Grosse is not intended to, nor is it capable of, absorbing liquid exudates. The dam of Grosse is a "volume of odor-absorbing granulated charcoal covered by a layer of filler material and encapsulated within a flexible web" [Grosse at Abstract; col. 1, lines 26-29; col. 3, lines 51-67; Figs. 4 and 5]. None of these materials are liquid-absorbent. Quite the opposite- granulated charcoal is employed in fish tank filters to absorb noxious gases from the water *while allowing the water to circulate freely through it*. Combination of the dam of Grosse with the teaching of Yabrov therefore fails to provide all of the elements of the Applicant's invention. Furthermore, the use of a non-liquid absorbent pad in the article of the Applicant, such as the dam of Grosse, would likely result in catastrophic failure of the article of the Applicant with respect to its intended purpose because liquid exudates would likely not be containable within the article. For this reason, the combination of Yabrov with Grosse does not make the invention of the Applicant obvious. Reconsideration and withdrawal of the rejection of claims 2, 3, 5, 6, 8-11, and 13-20 as being unpatentable over Yabrov in view of Grosse is therefore respectfully requested.

Furthermore, the Applicant has herein amended claim 2 in order to more particularly point out and claim that the additional absorbent pad of medium thickness of the invention of the Applicant is *liquid-absorbent*. Support for this amendment occurs throughout the Specification, including at least at page 5, line 23 to page 6, line 2, page 6 lines 16-17, page 8, lines 4-6, and page 11, lines 4-8 of the Specification and in Figs. 4-6. No new matter is added by this amendment. Entry of this amendment is respectfully requested.

As discussed in the Interview and previously in this section, the dam of Grosse is not liquid-absorbent, but rather is only capable of absorbing odors. In contrast, in order to obtain the benefits of the Applicant's invention, the raised structure/additional pad must be liquid-absorbent, as the Applicant's invention is directed to absorbing liquid exudates, not merely odors. The article of independent claim 2, as amended, is therefore not shown in the art of record nor in any other prior art, nor is it obvious over Yabrov in view of Grosse or any other prior art. Withdrawal of the rejection and allowance of claim 2, as amended, is therefore respectfully requested. Further, because claims 3, 5-6, 8-11, 13, and 14 depend from currently

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amended independent claim 2, which is now in condition for allowance, claims 3, 5-6, 8-11, 13, and 14 are also now in condition for allowance. Withdrawal of the rejections and allowance of claims 3, 5-6, 8-11, 13, and 14 is therefore also respectfully requested.

The Applicant's invention is not obvious over Yabrov in combination with Grosse or any other art of record, because combination of Yabrov with Grosse would change the principle of operation of Grosse. As discussed previously, the teaching of Grosse is directed toward absorbing odors and noise from flatulence. The article of Grosse has no liquid-absorbing capabilities, while the additional absorbent pad of the Applicant has no odor-absorbing capabilities. The principles of operation of Grosse and the Applicant's invention are therefore clearly different. To use the dam of Grosse in the manner proposed by the rejection would therefore change the principle of operation of Grosse. As outlined in MPEP 2143.01 (VI), "If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious." For this reason, the combination of Yabrov with Grosse does not make the invention of the Applicant obvious. Reconsideration and withdrawal of the rejection of claims 2, 3, 5, 6, 8-11, and 13-20 as being unpatentable over Yabrov in view of Grosse is therefore respectfully requested.

The Applicant's invention is also not obvious over Yabrov in combination with Grosse or any other art of record, because there was no suggestion or motivation in Yabrov, in Grosse, in any other reference, or in the knowledge generally available to one of ordinary skill in the art of the Applicant's invention to combine Yabrov with the other referenced teachings to obtain the benefits of the Applicant's invention. The Office Action states that it "would have been obvious ... to modify the pad of Yabrov with a dam as taught in Grosse *for the benefits that Grosse discloses*". As discussed previously, however, the benefits that Grosse discloses are those of absorbing the odors and noise of flatulence, which are not the benefits provided by the Applicant's invention (absorbing liquid exudates). Similarly, the benefits disclosed by Yabrov are also the benefits of absorption of the noise and odors of flatulence. The only thing that these problems have in common is that they are all emitted from the same orifice of the body. Just as a person looking for a solution to the problem of excessive drooling from the mouth would not look to the art of controlling unpleasant mouth odors for a solution to the problem, one of

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ordinary skill in the art of the Applicant's invention would not, simply on the basis of bodily orifice alone, look to the art of absorbing noise and odor for a solution to the problems that are solved by the Applicant's invention. For this reason, the combination of Yabrov with Grosse does not make the invention of the Applicant obvious. Reconsideration and withdrawal of the rejection of claims 2, 3, 5, 6, 8-11, and 13-20 as being unpatentable over Yabrov in view of Grosse is therefore respectfully requested.

The Applicant's invention is not obvious over Yabrov in combination with Grosse or any other art of record, because there was no reasonable expectation of success from the combination of Yabrov with Grosse. As discussed in the Interview, the semi-rigid or rigid structure of Yabrov, when combined with the dam of Grosse, would also not provide the Applicant's invention because the wearer would experience discomfort and chafing caused by the semi-rigid or rigid structure of Yabrov when the dam of Grosse was inserted between the buttocks of the user. In combination with the fact that the dam of Grosse is not liquid-absorbent, as discussed previously, one would therefore have had no reasonable expectation of success from the combination of Yabrov with Grosse for the purpose of the Applicant's invention. For this reason, the combination of Yabrov with Grosse does not make the invention of the Applicant obvious. Reconsideration and withdrawal of the rejection of claims 2, 3, 5, 6, 8-11, and 13-20 as being unpatentable over Yabrov in view of Grosse is therefore respectfully requested.

The Applicant's invention is also not obvious over Yabrov in combination with Grosse or any other art of record, because the problems with the prior art in the Applicant's field of endeavor were well known and long-felt but, despite the existence of the Yabrov and Grosse teachings, the art tried and failed to solve the problems. The problem of anal incontinence and the failures of the prior art solutions have long been known in the art of the Applicant's invention and are discussed at length in the Background section of the Specification. The pads of Yabrov and Grosse, and other pads like them, have been known for decades, as have pads for the absorption of menstrual fluids in females. Despite this, the art has repeatedly tried and failed to solve the problems solved by the Applicant's invention. For this reason, the combination of Yabrov with Grosse does not make the invention of the Applicant obvious. Reconsideration and withdrawal of the rejection of claims 2, 3, 5, 6, 8-11, and 13-20 as being unpatentable over Yabrov in view of Grosse is therefore respectfully requested.

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The combination of Yabrov and Grosse does not show the midline ridge of claims 3 and 15 of the Applicant, nor is such a structure found in any other art of record. Specifically, claim 3 and 15 both call out *a midline ridge extending from the center of the second end to the center of the first end and adapted to fit into the buttock cleft*. This structure is clearly depicted in Figs. 1-3 and defines the presently preferred embodiment of the invention, serving to minimize lateral displacement of the article with respect to the buttocks and increasing the absorbency of the article at the point of leakage [Specification at page 9, lines 16-22]. During the Interview, the Examiner agreed that this element is not shown by the combination of Yabrov with Grosse or by any other art of record. Reconsideration and withdrawal of the rejections of claims 3 and 15 as being unpatentable over Yabrov in view of Grosse and the allowance of claims 3 and 15 is therefore respectfully requested.

Because claims 6, 9, 11, and 14 depend from claim 3, which is in condition for allowance, claims 6, 9, 11, and 14 are similarly in condition for allowance. Because claims 16-20 depend from claim 15, which is in condition for allowance, claims 16-20 are also now in condition for allowance. Withdrawal of the rejections and allowance of claims 6, 9, 11, 14, and 16-20 is therefore also respectfully requested.

V. New Claim

The Applicant has added new claim 21, dependent on claim 2, in order to claim that *the article is of non-rigid construction*. Support for new claim 21 is found in the specification at least at page 7, lines 23-24, so no new matter is presented by this new claim. Entry of new claim 21 is therefore respectfully requested. In view of the previous cancellation of claims 1, 4, 7, and 12, no fee is necessitated by this additional claim. Claim 21 is dependent on claim 2, which the Applicant believes is in condition for allowance, so claim 21 is also in condition for allowance, which action is therefore respectfully requested.

Furthermore, as presented during the Interview, the modification of Yabrov in order to incorporate this element into the combination of Yabrov and Grosse would render the article of Yabrov unsatisfactory for its intended purpose. The MPEP states at 2143.01(V) that if "the proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification."

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Yabrov is directed mainly to the absorption of odors and noise, which benefits are provided by means of the semi-rigid or rigid shell employed by Yabrov. Substituting a non-rigid construction, as called out by the limitation of claim 21, would therefore cause Yabrov not to function as intended. For this reason, claim 21 is not anticipated or rendered obvious by Yabrov, Grosse, or any other art of record, whether taken alone or in combination. Allowance of new claim 21 is therefore respectfully requested.

VI. Conclusion

Claim 2 has been amended. New claim 21 has been added. The Applicant respectfully submits that claims 2, 3, 5, 6, 8-11, and 13-21 are now in condition for allowance. For this reason, and in view of the foregoing arguments, the Applicant believes that this application is now in condition for allowance, which action is respectfully requested.

Because this response is being filed within two months of the mailing date of this Final Action, the Applicants respectfully request that the Examiner issue an Advisory Action should there remain any unresolved issues, as well as telephone Norma E. Henderson, Applicant's Attorney, at 603-437-4400, so that all such issues may be resolved as expeditiously as possible.

Respectfully Submitted,

By: _____

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